

currently utilizes third-party providers that have built into NuVox's location and connected to NuVox's switch, these providers are not utilized to provide DS1 transport for EELs. Coker Decl. ¶ 4. There are substantial costs involved in having a carrier build into a switch location, even for carriers that have fiber nearby. Coker Decl. ¶ 10. Such carriers would still have to splice fiber and build a lateral into NuVox's switch location. In order to provide needed protection through diverse routing, two entrances into NuVox's switch location must be constructed. Coker Decl. ¶ 10. NuVox understands these construction costs to be in the range of \$100,000.00 to \$150,000.00. Coker Decl. ¶ 10. Additionally, permits must be obtained from municipalities, utilities and other entities whose property may be crossed by the lateral. Coker Decl. ¶ 10. Because of these costs, carriers typically demand a revenue commitment from NuVox of at least \$10,000.00 to \$20,000.00 per month before they will build into NuVox's switch location. Coker Decl. ¶ 10. NuVox cannot meet these revenue commitments simply to backhaul DS1 traffic from scattered incumbent LEC wire centers to NuVox collocation arrangements or switching sites, and it certainly cannot make the commitment to the multiple vendors that would be needed to reach the widely dispersed wire centers from which NuVox obtains local loops. Coker Decl. ¶ 10.

Additionally, it is NuVox's experience that third-party carriers do not reach many of the wire centers where NuVox needs transport. Even carriers with fiber rings do not connect to all wire centers. Coker Decl. ¶ 5. If the fiber carrier's ring is not already built into the wire center where the DS1 loop component of the EEL terminates (which is very

likely as NuVox obtains EELs from many wire centers where there are no third-party providers)^{20/}, the carrier must build into that wire center. Coker Decl. ¶ 8. NuVox's experience is that the transport provider requires a commitment of three to five DS3s worth of traffic in order to build a lateral into a wire center that the carrier's ring passes, or 12 or more DS3s worth of traffic if the carrier needs to build a longer spur off the ring to reach the wire center.^{21/} Coker Decl. ¶ 8. NuVox cannot make that type of commitment simply for the transport leg of a DS1 EEL that generates \$500.00 to \$700.00 per month of revenue, on average. Coker Decl. ¶ 9.

Using third-party providers for the DS1 component of an EEL creates additional costs and burdens even in the rare circumstance that the third-party is already collocated at both ends of the transport leg of the EEL. Coker Decl. ¶ 11. Having multiple carriers provide service over what had been, and what is logically, a single end-to-end circuit significantly complicates repair and maintenance. Coker Decl. ¶¶ 11-12. Circuit outages or disruptions must be reported to multiple vendors, each of which must test its segment of the circuit; a process which must be done seriatum until the problem is located. Coker Decl. ¶ 12. Additional coordination is required for turning up the circuit or taking it down for maintenance. Coker Decl. ¶ 12. Although these types of vendor management issues have been manageable for NuVox when using vendors at the OC-n or multiple DS-

^{20/} See Attachment 1 to Coker Declaration (identifying wire centers in price flex MSA where NuVox obtains loops but the ILEC has not identified any third-party providers).

^{21/} Note that these levels are consistent with the finding in the *TRO* that a carrier typically needs 12 DS3s worth of traffic to deploy fiber along a route. *TRO* ¶ 388 (establishing a maximum of 12 DS3s that a carrier may obtain along a route).

3 level for interLATA transport they are significantly magnified when used for hundreds or even thousands of discrete DS1 segments. Coker Decl. ¶ 12. Finally, it is worth reiterating that, although NuVox has identified the difficulties with using a third party carrier to provide the transport component of an EEL, the reality is that such providers do not exist at all on the vast majority of routes.

iii. Special Access Interoffice Transport Is Not a Substitute

NuVox explains in detail below why special access is not a viable substitute for UNEs generally. Here, NuVox addresses the more discrete issue of the economic infeasibility of commingling DS1 special access transport with UNE loops. The greatest discrepancy between TELRIC rates and ILEC tariffed special access rates is in the mileage rate element of interoffice transport. As noted in the tables below at Section IV(B), comparing UNE rates with special access rates, tariffed special access rates for the mileage component of interoffice transport are orders of magnitude higher than the comparable TELRIC-based charge. In the Atlanta region, for example, the TELRIC mileage cost of a ten-mile EEL is \$1.15, compared to \$180.00 under BellSouth's month-to-month special access rates or \$80.00 under BellSouth's discount plan. As the tables indicate, there is also an additional fixed monthly charge associated with each interoffice facility that also is substantially higher under special access pricing than TELRIC. In Atlanta, for example, the TELRIC charge for the fixed component of interoffice transport is \$34.19, whereas the special access fixed charge is \$85.00 under a month-to-month plan and \$65.00 under the identified BellSouth's discount plan. The same result occurs in

other Bell regions. In Indianapolis, which incorporates two different special access pricing zones, the mileage component cost of a ten-mile EEL increase from \$16.50 under UNE pricing to \$282.00 under month-to-month in zone 2 and to \$344.00 in zone 4. Under a five-year discount plan, the cost increases to \$137.50 or \$140.50 in zones 2 and 4 respectively. The discrepancy is not the result of artificially low TELRIC rates but rather the monopoly pricing that ILECs are able to extract from special access services. Pricing flexibility has only exacerbated this disparity. For example, BellSouth's per mile charge in price flex MSAs (\$8.00) is twice as high as in non-price flex MSAs (\$3.90). Additionally, ILECs may impose nonrecurring charges and other costs on carriers upon replacing EEL transport with special access transport.

D. DS1 EELs Promote Facilities-Based Competition

In addition to impairment, there are sound policy reasons for retaining EELs. As the Commission previously concluded, and in contrast to special access services,^{22/} EELs promote facilities-based competition and innovation. *TRO* ¶ 576. EELs enable CLECs to extend their geographic footprint, enabling them to provide competitive service to small business customers who may be located outside of the city centers or areas of business concentration. *See id.* This is certainly true for NuVox. Through the use of EELs, NuVox is able to extend its footprint and addressable market substantially. Jennings Decl. ¶ 7. Without the use EELs, NuVox would be limited to serving only those customers that can be reached directly from those wire centers. Jennings Decl. ¶ 7. With

^{22/} See discussion below at section IV(F)(2).

EELs, however, NuVox is able to serve small business customers from more than 1,500 ILEC wire centers in which NuVox is collocated. Jennings Decl. ¶ 7. Approximately 45 percent of NuVox's customers are served using EELs. Jennings Decl. ¶ 8.

E. The Commission Should Eliminate EEL Eligibility Requirements

The *TRO* properly jettisoned the onerous usage-based restrictions established in the *Supplemental Order Clarification*^{23/} and replaced them with architectural-based criteria. The purpose of the criteria was to ensure that carriers only used EELs to provide "qualifying services." *TRO* ¶ 591. The DC Circuit vacated the Commission's qualifying, non-qualifying services distinction but retained the eligibility criteria in case the Commission, on remand, determined that carriers were not impaired in providing long distance service without EELs. *USTA II*, 359 F.3d at 592-93.

That the Commission may on remand make service-specific impairment determinations does not, however, warrant the continuation of eligibility criteria and the certification and auditing framework built up to assess compliance. The framework imposes unnecessary costs on the use of EELs, particularly for smaller facilities-based carriers providing services in the small and medium-sized business market. The certification and auditing requirements simply provide a tool by which ILECs impose additional costs and burdens on this segment of the competitive industry.

^{23/} *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order Clarification, 15 FCC Rcd 9587 (2000) ("*Supplemental Order Clarification*"), *aff'd sub nom. CompTel v. FCC*, 309 F.3d 3 (D.C. Cir. 2002).

If the Commission adopts rules that UNEs are not be used for the provision of certain services, violation of the rule would justify the filing of a 208 complaint, just as any other violation of the Commission's rules. There is no reason to erect a self-help process by which ILECs impose the costs and burdens of audits on carriers. The certification and audit process has imposed significant burdens not just on CLECs but on state commissions as well. BellSouth, for example, has filed complaints against legacy NuVox seeking audits in five states and against legacy NewSouth in four states.

Eligibility criteria have created confusion and imposed unnecessary burdens on the industry. They should be eliminated. If an ILEC has a good faith basis to believe a carrier is violating a Commission rule by using UNEs for services for which the Commission has determined no impairment, the carrier may file a complaint with the Commission and seek appropriate damages.

III. The Commission Should Find that CLECs Are Impaired without Access to ILEC Loops Used to Serve Small Business Customers

In the preceding sections, NuVox has explained that it and similarly situated facilities-based carriers are impaired without access to unbundled DS1 loops and EELs when serving small and medium-sized business customers. The foregoing analysis has largely tracked the capacity-based analysis adopted by the Commission.

As the Commission recognized, however, impairment turns not just on capacity, but may also be informed by the customer class seeking to be served. In the *TRO*, the Commission identified three discrete customer classes based on different economic characteristics – the mass market, small and medium-sized business enterprise market,

and large business market. *TRO* ¶ 123. The Commission concluded that these customer classes can differ significantly based on the services purchased and that, for certain network elements, “the determination whether impairment exists may differ depending upon the customer class a competing carrier seeks to serve.” *TRO* ¶ 124.

These customer class distinctions informed the Commission’s impairment findings for local loops. *TRO* ¶¶ 209-10. The Commission determined, for example, that ILECs need not unbundle certain fiber loops for broadband services to the mass market. This determination was based, in part, on the broadband competition posed by cable companies in the mass market. *TRO* ¶ 245. The Commission separately analyzed loop impairment for the enterprise market. It determined to exclude unbundling for lit fiber services to the large company segment of the enterprise market because carriers could economically self-deploy to such customers. *See, e.g., TRO* ¶¶ 316-17 (noting characteristics of large enterprise customers that purchase OCn level services that render such service economically feasible to self-deploy). The Commission effectively defined the lower limit of this market at two DS3s of capacity. *TRO* ¶ 324 (“consistent with our finding of no impairment at the OCn loop capacity level, and because the record confirms that it is economically feasible to self-deploy at a three DS3 loop level to a particular customer location, we limit an incumbent LEC’s unbundling obligation to a total of two DS3s per requesting carrier to any single customer location.”)

In contrast to large business customers served at the OCn and multiple DS3 level, the Commission found that carriers would be impaired without access to ILEC loops

when competing for small to medium-sized business customers. *See, e.g., TRO ¶ 325.*

This customer class shares a number of critical differentiating characteristics, many of which have been discussed herein. Among them are that there is little, if any, intermodal competition, limited revenue opportunity for the carriers serving them, and greater churn. They are also more widely dispersed, typically have less in-house telecommunications expertise yet require relatively sophisticated, high quality services, and must be marketed on a one-on-one basis. It also a customer class that, until competition arrived from facilities-based carriers, largely had been underserved by the incumbent LEC community.

Finally, it is a customer class that has often been identified as a critical driver of innovation, job growth, and economic activity. As such, it is critical that competition be preserved for this customer class. *See, e.g., Interim Order and NPRM, Dissenting Statement of Commissioner Michael J. Copps* (noting the importance of small businesses to the economy and that competition has brought affordable access to innovative broadband services to this customer class).

In light of the importance of maintaining the only effective competition currently available for small and medium-sized business customers, NuVox urges the Commission to consider impairment for this class not solely in terms of discrete facilities, such as DS1s, but with respect to *any* last-mile facilities that the incumbent LECs deploy but which are not economically feasible to duplicate when serving this customer class. The Commission previously confirmed exactly this point when it concluded that incumbent LECs must provide enterprise loops regardless of the technology that the incumbent

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deploys. *See TRO* n.956. The predicate for the impairment finding for this customer class is that small businesses generate insufficient revenue to overcome entry barriers. This predicate does not change with the type of loop facility the incumbent LEC chooses to deploy.

There are no substantial countervailing benefits that would offset the loss of competition that will result if carriers are unable to obtain access to incumbent LEC last mile facilities to serve this customer class. The Commission previously justified fiber unbundling relief on the grounds of creating incentives for broadband deployment to the mass market. This incentive will not be eliminated by requiring unbundling of incumbent local loops to serve small and medium-sized business customers. Nor are there technical limitations to requiring unbundled access to fiber-based loops, whether TDM-based or packet-based. As NuVox has previously informed the Commission, NuVox already obtains DS1 level capacity over incumbent LEC packetized loop infrastructure. *See* Declaration of Amy L. Gardner, attached to NewSouth Communications Corp. and Comptel/Ascent Alliance Opposition to BellSouth's Petition for Clarification or Partial Reconsideration, CC Docket Nos. 01-338, 96-98, 98-147, ¶¶ 5-6 (Nov. 6, 2003). The declaration is resubmitted as Exhibit D to this filing. At any rate, existing rules adequately protect incumbent LECs from unbundling obligations that are technically infeasible. 47 C.F.R. § 51.311(b).

The Commission can readily delineate a bright-line rule that will ensure that carriers only obtain facilities to serve this customer class. The rule would permit carriers

to obtain unbundled access to any incumbent LEC loop facilities that have a capacity between the DS1 and two DS3 capacity level. This capacity level delineates the small to medium-sized business class, as the Commission effectively has previously found by imposing the two DS3 loop cap. In the absence of such a rule, carriers may well begin to deprive NuVox and other facilities-based carriers of last mile facilities needed to serve small businesses by claiming that new (or existing) fiber that they deploy to serve the mass market also need not be unbundled to serve small businesses.

IV. The Availability of Special Access Services Has No Relevance to Determining Impairment for DS1 Loops and EELs

The Court in *USTA II* held that the Commission's impairment analysis must consider the availability of tariffed ILEC special access services when determining impairment. 359 F.3d at 577. The Court was also equally clear that, on an appropriate record, the availability of special access does not preclude a finding of impairment. 359 F.3d at 577. The Court noted, for example, that the availability of special access may well be irrelevant to impairment in light of factors such "administrability, risk of ILEC abuse, and the like." 359 F.3d at 577. As the Court stated, "given the ILECs' incentive to set the tariff price as high as possible and the vagaries of determining when that price gets so high that the 'impairment' threshold has been crossed, a rule that allowed ILECs to avoid unbundling requirements simply by offering a function at lower[sic]-than-TELRIC rates might raise real administrability issues." *Id.* at 576. Such complications may support a blanket rule treating ILEC tariffed service as irrelevant to impairment. *Id.*

Another key point of the *USTA II* Court's discussion of special access services is that the FCC must carefully assess the end user market or services for which special access is an input. The Court noted that the presence of "robust competition in a market where CLECs use critical ILEC facilities by purchasing special access" may preclude a finding of impairment. 359 F.3d at 593. Thus, the key task for the Commission on remand will be to assess these various factors and determine the extent to which the availability of special access affects impairment.

For the reasons detailed below, special access services are not an economically viable substitute for DS1 loops and EELs, and should be viewed as irrelevant to impairment for these facilities.

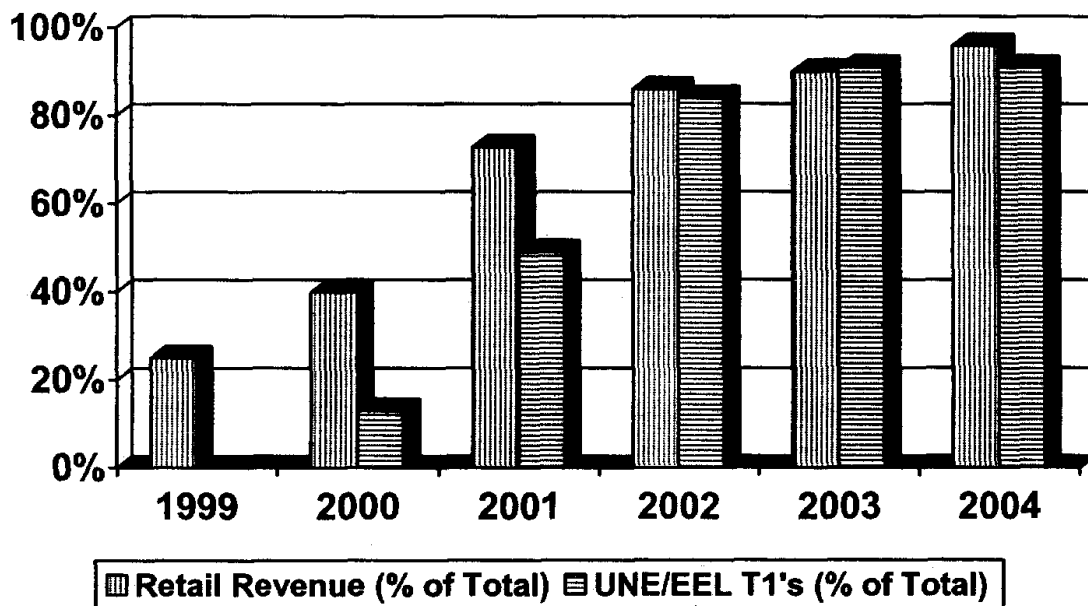
A. Entry into the Small Business Market Has Occurred Through the Use of UNEs, Not Special Access

The *USTA II* Court vacated the Commission's finding that CMRS carriers have access to interoffice transport on the ground that having to use the ILECs' special access service has not made entry uneconomic for such carriers. 359 F.3d at 577. Whatever the merits of that conclusion with respect to CMRS carriers, (and the Court conducted no rigorous examination of markets, market participants, competition or costs), it has no application to the small and medium-sized business market served by facilities-based CLECs using DS1 loops and EELs. NuVox certainly has not been able to enter and compete in this market using special access services. NuVox's ability to compete in this market is due to the availability of DS1 loops and EELs at the cost-based rates mandated in the 1996 Act. As the chart below demonstrates, NuVox's entry into this market, as

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evidenced by the growth of revenue from retail end users as an overall percentage of revenue (as opposed to revenue from intercarrier compensation), has coincided with the reduction in use of special access services and a concomitant increase in the use UNEs. Today, 90 percent of the circuits used by NuVox to provide service to small business customers are UNEs and more than 90 percent of NuVox's revenue comes from end users. Jennings Decl. ¶ 8.

Market Entry Coincides With UNE Access



B. Special Access Rates, Even When Discounted, Are Substantially Higher than TELRIC Rates

NuVox could not have entered, and cannot now remain, in the small business market if forced to use special access services because the substantially higher rates for such services charged in the ILEC tariffs would render NuVox's provision of services uneconomic. Jennings Decl. ¶ 9. Special access rates, even when discounted, are

substantially higher than TELRIC rates in virtually every area of the country where NuVox competes. Jennings Decl. ¶ 9. NuVox would have no choice but to pay these higher rates because there are virtually no alternative providers of DS1 level transport or loops, and it simply is not economically feasible for NuVox to build its own loops and transport. Jennings Decl. ¶ 9. NuVox estimates that substituting discounted special access services for cost-based DS1 network elements increases NuVox's monthly costs by approximately [REDACTED] compared to total monthly revenue of approximately [REDACTED]. Jennings Decl. ¶ 9.

The table below summarizes the actual increase in costs to NuVox resulting from having to substitute UNE rates with special access rates in just five of NuVox's markets. The table compares UNE rates to both month-to-month special access rates and discounted special access rates available under the Bell companies' tariffed discount plans various parts of NuVox's service area. The monthly cost for DS1 circuits in just the five areas analyzed increases by nearly [REDACTED] using month-to-month tariffed special access rates and by more than [REDACTED] using discounted term plans.

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[REDACTED]

[REDACTED]

[REDACTED]

The tables below provide detailed information on the cost differences between special access and UNE rates on an element-by-element basis in these five areas. They compare current UNE rates as set forth in existing interconnection agreements with month-to-month and discounted special access rates in interstate special access tariffs.^{24/} The analysis demonstrates that the cost of a ten-mile circuit, approximately the average length of a NuVox EEL, increases substantially under special access pricing, even under the Bell companies' discount plans. Jennings Decl. ¶¶ 9-11. In Atlanta, for example, the cost increases from \$76.74 under UNE rates to \$435.00 under month-to-month rates and \$270.65 under BellSouth's discount plan. In Indianapolis, costs increase from \$66.00 to more \$671.00 on a month-to-month basis or \$280.00 under an Ameritech five-year term commitment discount plan. Similar increases occur in the other areas reviewed.

^{24/} SBC and BellSouth discount plans are described below at Section IV(F)(2).

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UNE/EEL Pricing vs. Special Access Pricing

ATLANTA MSA

UNE DENSITY ZONE 1, SPA DENSITY ZONE 1 MSA PRICE FLEX (FULL RELIEF)

ELEMENT	EEL USOCs	EEL RATE	SPA USOCs	SPA MTM	SPA 49 MOS.	BELLSOUTH TARIFF REF.
Channel Termination (DS1Loop)	USLXX	\$41.02	TMECS	\$168.00	\$123.00	FCC #1 23.5.2.9(A)(1)
Mileage@ 10 miles	1L5XX	\$1.15	1L5XX	\$180.00	\$80.00	FCC #1 23.5.2.9(B)(2)
Interoffice Channel Fixed	U1TF1	\$34.19	1L5XX	\$85.00	\$65.00	FCC #1 23.5.2.9(B)(2)
COLO Cross Connect	PEIP1	\$0.37	PEIP1	\$2.65	\$2.65	FCC #1 13.3.23 (B)(1)
Total		\$76.74		\$435.65	\$270.65	

GREENVILLE SC MSA

UNE DENSITY ZONE 1, FCC DENSITY ZONE 2 MSA PRICE FLEX (LIMITED RELIEF)

ELEMENT	EEL USOCs	EEL RATE	SPA USOCs	SPA MTM	SPA 49 MOS.	BELL SOUTH TARIFF REF.
Channel Termination (DS1Loop)	USLXX	\$79.51	TMECS	\$175.00	\$123.00	FCC #1 7.5.9(A)(1)
Mileage@ 10 miles	1L5XX	\$3.42	1L5XX	\$186.50	\$54.50	FCC #1 7.5.9(B)(2)
Interoffice Channel Fixed	U1TF1	\$77.14	1L5XX	\$80.00	\$70.00	FCC #1 7.5.9(B)(2)
COLO Cross Connect	PEIP1	\$1.12	PEIP1	\$2.65	\$2.65	FCC #1 13.3.23(B)(1)
Total		\$161.19		\$444.15	\$250.15	

INDIANAPOLIS MSA

UNE DENSITY ZONE 3, SPA DENSITY ZONE 2 MSA PRICE FLEX (LIMITED RELIEF)

ELEMENT	EEL USOCs	EEL RATE	SPA USOCs	SPA MTM	SPA 5- YR.	AMERITECH TARIFF REF.
Channel Termination (DS1Loop)	4U1X3	\$38.48	TZ4X2	\$280.00	\$110.00	FCC #2 7.5.9(B)(1)
Mileage@ 10 miles	1YZX3	\$16.50	1YZX2	\$282.00	\$137.50	FCC #2 21.5.2.7(B)(4)
Interoffice Channel Fixed	CZ4X3	\$11.10	CZ4X2	\$103.00	\$26.30	FCC #2 21.5.2.7(B)(3)
COLO Cross Connect	CXCDX	\$0.36	CXCDX	\$6.89	\$6.89	FCC #2 16.5(4)(B)
Total		\$66.44		\$671.89	\$280.69	

INDIANAPOLIS MSA

UNE DENSITY ZONE 3, SPA DENSITY ZONE 4 MSA PRICE FLEX (LIMITED RELIEF)

ELEMENT	EEL USOCs	EEL RATE	SPA USOCs	SPA MTM	SPA 5- YR.	AMERITECH TARIFF REF.
Channel Termination (DS1Loop)	4U1X3	\$38.48	TZ4X4	\$353.00	\$130.00	FCC #2 21.5.2.7(B)(1)
Mileage@ 10 miles	1YZX3	\$16.50	1YZX4	\$344.00	\$140.50	FCC #2 21.5.2.7(B)(4)
Interoffice Channel Fixed	CZ4X3	\$11.10	CZ4X4	\$108.00	\$50.75	FCC #2 21.5.2.7(B)(3)
COLO Cross Connect	CXCDX	\$0.36	CXCDX	\$6.89	\$6.89	FCC #2 16.5(4)(B)
Total		\$66.44		\$811.89	\$328.14	

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WICHITA MSA

UNE DENSITY ZONE 3, SPA DENSITY ZONE 3 NON-MSA PRICING

ELEMENT	EEL USOCs	EEL RATE	SPA USOCs	SPA MTM	SPA 5- YR.	SWBT TARIFF REF.
Channel Termination (DS1Loop)	U4D1X	\$64.78	TMECS	\$185.00	\$102.90	FCC #73 7.3.10(F)(1) & 7.3.10(F)(10.3)(a)
Mileage@ 10 miles	ULNHS	\$3.50	1L5XX	\$155.00	\$88.50	FCC #73 7.3.10(F)(2) & 7.3.10(F)(10.3)(b)
Interoffice Channel Fixed	ULNHS	\$46.86	1L5XX	\$60.00	\$34.00	FCC #73 7.3.10(F)(10.3)(b) & 7.3.10(F)(2)
COLO Cross Connect	UCXHX	\$7.12	SP1A1	\$4.64	\$4.64	FCC #73 25.7.5(A)(1)
Total		\$122.26		\$404.64	\$230.04	

ST. LOUIS MSA

UNE DENSITY ZONE 1, SPA DENSITY ZONE 2 MSA PRICE FLEX

ELEMENT	EEL USOCs	EEL RATE	SPA USOCs	SPA MTM	SPA 5- YR.	SWBT TARIFF REF.
Channel Termination (DS1Loop)	U4D1X	\$91.06	TMECS	\$183.00	\$95.00	FCC #73 7.3.10(F)(1) & 7.3.10(F)(10.3)(a)
Mileage@ 10 miles	ULNHS	\$5.10	1L5XX	\$170.00	\$105.00	FCC #73 39.5.2.7(B) & 39.5.2.7(N)(2)
Interoffice Channel Fixed	ULNHS	\$46.85	1L5XX	\$80.00	\$37.50	FCC #73 39.5.2.7(B) & 39.5.2.7(N)(2)
COLO Cross Connect	UCXHX	\$14.51	SP1A1	\$4.64	\$4.64	FCC #73 25.7.5(A)(1)
Total		\$157.52		\$437.64	\$242.14	

ST. LOUIS MSA

UNE DENSITY ZONE 1, SPA DENSITY ZONE 3 MSA PRICE FLEX

ELEMENT	EEL USOCs	EEL RATE	SPA USOCs	SPA MTM	SPA 5- YR.	SWBT TARIFF REF.
Channel Termination (DS1Loop)	U4D1X	\$91.06	TMECS	\$185.00	\$102.90	FCC #73 7.3.10(F)(10.3)(a)
Mileage@ 10 miles	ULNHS	\$5.10	1L5XX	\$180.00	\$110.00	FCC #73 39.5.2.7(B) & 39.5.2.7(N)(2)
Interoffice Channel Fixed	ULNHS	\$46.85	1L5XX	\$85.00	\$40.00	FCC #73 39.5.2.7(B) & 39.5.2.7(N)(2)
COLO Cross Connect	UCXHX	\$14.51	SP1A1	\$4.64	\$4.64	FCC #73 25.7.5(A)(1)
Total		\$157.52		\$454.64	\$257.54	

C. Special Access Pricing Renders The Provision of Service to Small Business Customers Uneconomic

Cost increases of the magnitude described above cannot be absorbed when serving small and medium-sized customers, as NuVox does. Incumbent LEC last mile facilities account for a substantial portion of NuVox's cost of providing service. With cost-based pricing, ILEC last mile facilities account for approximately [REDACTED] of the network cost of serving a customer on average. Substituting

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discounted special access rates for UNE EEL increases the network costs per customer to [REDACTED] on average Jennings Decl. ¶ 11.

NuVox has no ability to pass through cost increases of this magnitude by raising the prices it charges small business customers. As noted above, more than 18,000 of NuVox's 38,000 customers purchase 12 lines or less, and generate revenues of, on average, between \$500.00 to \$700.00 per month for the entire suite of services NuVox provides. The result of requiring NuVox to use special access is that NuVox goes from positive to negative EBITDA. Jennings Decl. ¶ 11. The results are depicted in the table below:

[REDACTED]

[REDACTED]

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D. Effect of Special Access Pricing on Small Business Customers

Eliminating cost-based DS1 access and forcing carriers to pay special access rates will have a detrimental impact not only on CLECs but also on their small business customers. Comptel/Ascent recently submitted the results of a study measuring the impact on small and medium-sized businesses if DS1 loops and interoffice transport were no longer available as unbundled network elements and carriers were forced to pay tariffed special access rates.^{25/} Consistent with the disparity between cost-based pricing for UNEs and special access rates for comparable facilities reflected in the tables above, the *MiCRA Study* found that use of special access services would impose substantial costs on CLECs. *MiCRA Study* at 4. The study noted that one reason for the disparity in pricing is that special access rates bear little relation to economic cost but rather are remnants of monopoly pricing regime that included both arbitrary allocations and substantial cross-subsidies among ILEC services. *Id.* The study concluded that, nationwide, the weighted average monthly cost increase to CLECs of shifting from UNE DS1 facilities to special access was \$355.00 per DS-1 line. *Id.* at 6. The gross impact on CLECs overall if forced to migrate to special access for DS1 facilities was \$2 billion annually. *Id.* at 9.

^{25/} *The Economic Impact of the Elimination of DS-1 Loops and Transport as Unbundled Network Elements*, Michael D. Pelcovits & Mark T. Bryant, Microeconomic Consulting & Research Associates, Inc. (June 29, 2004) (*MiCRA Study*), submitted as an attachment to the Letter from H. Russell Frisby, Jr., CEO of Comptel/Ascent, to Michael K. Powell, Chairman of the FCC, CC Docket Nos. 01-338, 96-98 and 98-147 (July 9, 2004).

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The study recognized that CLECs could not sustain such an increase in the price of DS1 facilities but would be forced to increase prices, which in turn would lead to loss of market share and an exit from the market. The study concluded that the new market equilibrium caused by the shift to special access would be a 25 percent increase in the price small businesses pay for services delivered over DS1 facilities, and, in all but two states, CLECs exiting the market. *MiCRA Study* at 10. The overall decrease in benefits to small businesses amounts to \$4.9 billion annually. *Id.*

E. Demand for DS1 Loops and EELs Is Not Correlated to Levels of Overall ILEC Special Access Revenue

In recent filings purporting to demonstrate that carriers can use special access services in lieu of UNEs, Verizon claims that high capacity services are highly concentrated.^{26/} Verizon, however, measures concentration by assessing total billed revenue for all special access services, regardless of capacity or end user market.^{27/} Based on this methodology, Verizon states that more than 80 percent of special access demand in its region is concentrated in eight percent of its wire centers. This information, however, has no relevancy for ascertaining impairment at the DS1 level. As demonstrated below, demand for DS1 loops and EELs is not concentrated and does not

^{26/} Letter from Michael E. Glover, Senior Vice President and Deputy General Counsel of Verizon Communications Corp. ("Verizon"), to Marlene H Dortch, Secretary of the FCC, 01-338, 96-98, and 98-147 (July 2, 2004) ("Verizon July 2 Ex Parte"); Letter from Michael Glover, Senior Vice-President and Deputy General Counsel to Verizon, to Michael K. Powell, Chairman of the Federal Communications Commission, CC Docket Nos. 01-338; 96-98; 98-147 (July 19, 2004) ("Verizon July 19 Ex Parte").

^{27/} Verizon July 2 Ex Parte, Verses Declaration ¶ 8 (noting that concentration was measured based on "total billed revenue generated by Verizon's sales of high capacity special access services.").

correlate with general demand for special access services as measured by special access revenue.^{28/}

It comes as no surprise that revenues from all special access services are highly concentrated. As Verizon admits in its submission, the vast majority of its special access revenue comes from large enterprise customers or the largest interexchange carriers.^{29/} In fact, it is the concentrated nature of aggregate special access revenue that have enabled Bell Companies to qualify for pricing flexibility in many MSAs, despite the absence of competition in most areas of those MSAs.

The concentrated nature of high capacity special access service revenue in general, however, does not usefully inform the issue of DS1 impairment. This is because demand for DS1 loops and EELs used to provide local service to small and medium-sized business customers does not correlate with overall levels of special access revenue concentration, as was demonstrated during the *TRO* proceeding.

NewSouth, for example, demonstrated that its demand for DS1 loops and EELs is anything but concentrated, even in MSAs for which pricing flexibility relief had been granted based on concentration of overall special access revenues. In a January 14, 2003 *Ex Parte* filing in the *TRO* docket, NewSouth demonstrated that, whereas special access revenues may be concentrated in a limited number of wire centers, NewSouth service to

^{28/} Such demand is largely generated by very large business users, the major long distance carriers and CMRS providers.

^{29/} See, e.g., Verizon July 2 *Ex Parte* at 22 ("In Verizon's region, large enterprise customers account for more than 85 percent of total special access revenues purchased by end-user business customers.").

customers over DS1 loops and EELs was highly diffuse.^{30/} For example, in the Greenville, South Carolina MSA, BellSouth obtained pricing flexibility relief based on evidence of at least one fiber-based collocator in the five wire centers in that MSA where special access revenue was most concentrated. NewSouth showed, however, that it served customers over DS1 loops not just in those five wire centers, but in an additional 17 wire centers in that same MSA. No fiber-based collocators were present in any of those additional 17 wire centers, at least according to BellSouth's evidence. The same result obtained even in the largest MSAs. In the Atlanta MSA, for example, NewSouth demonstrated that it provided service to customers using DS1 loops in 51 wire centers in that MSA, yet BellSouth's pricing flexibility evidence showed the presence of at least one fiber-based collocator in only 16 of the wire centers in that MSA where special access revenue was most concentrated. NewSouth's January 14, 2003 filing is resubmitted and attached hereto as Exhibit E.

NuVox has conducted a similar analysis for MSAs in the SBC region and reached similar conclusions. For example, in the Akron, OH MSA, SBC obtained pricing flexibility relief based on evidence of at least one fiber-based collocator in the two wire centers in that MSA where special access revenue was most concentrated. NuVox, however, serves customers over DS1 loops not just in those two wire centers, but in an additional 15 wire centers in that same MSA. No fiber-based collocators were present in any of those additional 15 wire centers, at least according to SBC's evidence. In the

^{30/} Letter from Michael H. Pryor, Counsel for NewSouth Communications, to Marlene H. Dortch, Secretary of the FCC, CC Docket Nos. 01-338 and 96-98 (Jan. 14, 2003).

Saint Louis, MO-IL MSA, NuVox provides service to customers using DS1 loops in 16 wire centers in that MSA, yet SBC's pricing flexibility evidence showed the presence of at least one fiber-based collocater in only two of the wire centers in that MSA where special access revenue was most concentrated. The results of the analysis are at Attachment 1 of the Coker Declaration.

NuVox's specific factual evidence demonstrates that demand for DS1 loops and EELs is not correlated to areas of high overall special access revenue, contrary to Verizon's generalized assertions of concentrated high capacity demand. Indeed NuVox's evidence demonstrates that attempting to make impairment determinations for DS1 level facilities in broad geographic areas such as MSAs – even in those MSAs with greatest special access service demand as measured by revenue – would result in denial of cost-based DS1 facilities along a substantial number of routes where carriers are impaired. In sum, special access revenue demand is not a relevant fact for determining impairment for DS1 capacity facilities.

F. Use of Special Access Services Raises Substantive Administrability and Policy Concerns

As noted above, the *USTA II* Court recognized that various administrability concerns would render special access availability irrelevant to impairment. Special access does in fact raise a number of issues that the Commission must carefully assess. Special access pricing has already been discussed in some detail above. The additional point made here is that the Commission has limited ability effectively to regulate and control ILEC special pricing and related terms and conditions. Additionally, the

Commission must assess the effect that requiring carriers to use special access services would have on facilities-based competition. Special access tariffs are designed to, and their effect is, to keep as much traffic as possible on the Bell companies' networks and in particular to ensure that incremental growth goes on the BOCs' networks. Eliminating high capacity UNEs in favor of special access will thus undermine facilities-based competition. Finally, there may be unintended consequences – such as stranding collocation investment. These points are described below.

1. The Commission Has Little Ability To Oversee Special Access Rates

The *USTA II* Court noted the ILECs' incentive to raise special access rates and the difficulty that the Commission may have in determining when special access prices may get too high justifies a blanket rule treating special access as irrelevant. 359 F.3d at 578. This difficulty clearly exists. As discussed above, special access prices already exceed the impairment threshold because they render service to small and medium-sized business customers over DS1 facilities uneconomic. Moreover, there is substantial evidence that special access rates today are set at monopoly levels that generate excessive rates of return to the Bell companies.^{31/}

Additionally, it is unclear whether the Commission reviews or can review special access rates to determine that they are set at a level that will facilitate or impair competitive entry. As the Supreme Court noted in *Verizon Communications, Inc. v.*

^{31/} *ETI Report* at 27-35; *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM 10593, at 7-16 (Oct. 15, 2002) (“*AT&T Petition*”).

FCC,^{32/} rate making for services such as special access is done with an entirely different goal in mind. *Verizon* recognized that all rate-making schemes, including price cap regulation, have the basic assumption of continuing monopoly. 535 U.S. at 487-88. As the Court noted, price caps start with a rate generated by conventional cost-of-service formulations and are simply a scheme to offset the “utilities’ advantage of superior knowledge of the facts employed in cost-of-service rate making.” 535 U.S. at 487. As a result of the inherent limitations of rate-making schemes, including price caps, Congress adopted a wholly new approach of setting rates without reference to rate of return or other rate-based proceedings:

One possible lesson was drawn by Congress in the 1996 Act, which was that regulation using the traditional rate-based methodologies gave monopolies too great an advantage and that the answer lay in moving away from the assumption common to all rate-based methods, that the monopolistic structure within the discrete markets would endure. 535 U.S. at 488.

Moreover, as *Verizon* recognized, any rate for facilities that includes embedded costs, such as special access rates, results in ILECs passing their inefficiencies to competitors and raising consumer prices. 535 U.S. at 511-12 (“If leased elements were priced according to embedded costs, the incumbents could pass these inefficiencies to competitors in need of their wholesale elements, and to that extent defeat the competitive purpose of forcing efficient choices on all carriers whether incumbents or entrants. The upshot would be higher retail prices consumers would have to pay.”). Special access rates clearly have such built-in inefficiencies. 535 U.S. at 517-18 (noting that estimates

^{32/} 535 U.S. 467 (2002).

that ILECs have overstated costs by \$5 billion to \$25 billion and statements from Huber *et. al.*, describing ILEC accounting books as fiction).

The Supreme Court thus identified crucial aspects of special access rate making that inform the administrability issue raised by *USTA II*. One is that special access rate making even under price caps is based on an assumption of continued monopoly, which is antithetical to the key purpose of the 1996 Act to promote competition. Second, ILECs have insurmountable advantages in rate setting that makes it ultimately impossible to ensure the fairness of the rate and will make it difficult if not impossible, to determine whether such rates facilitate or impede efficient competitive entry. Finally, requiring carriers to use special access services forces them to subsidize ILEC inefficiencies. These are all reasons enough to preclude the use of special access.

Even if the Commission could however review special access rates to determine whether they are set at a level that enables or impedes competitive entry into the local market, the onset of pricing flexibility has untethered special access pricing from any meaningful review. The Commission's prediction that such review would be unnecessary because competition would restrain pricing has proven wholly incorrect. Instead, the Bell companies have often increased rates in the MSAs in which they have received pricing flexibility. Numerous parties have provided evidence of this fact.^{33/}

One further discrete, but important example is provided below. BellSouth's rates for the mileage component of interoffice transport – the service where one might expect

^{33/} See, e.g., *ETI Report* at 35-38; *AT&T Petition* at 12.